No. 94-1930

(4)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

THE ASSOCIATION OF NATIONAL ADVERTISERS, INC., GROCERY MANUFACTURERS OF AMERICA, INC., THE SOAP AND DETERGENT ASSOCIATION, NATIONAL FOOD PROCESSORS ASSOCIATION, THE SOCIETY OF THE PLASTICS INDUSTRY, INC., AMERICAN FOREST & PAPER ASSOCIATION, THE AMERICAN ADVERTISING FEDERATION, THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, THE CALIFORNIA CHAMBER OF COMMERCE, and THE CHAMBER OF COMMERCE OF THE UNITED STATES,

Petitioners,

—v.—

DANIEL LUNGREN, in his official capacity as Attorney General of the State of California, CALIFORNIANS AGAINST WASTE, and the ENVIRONMENTAL DEFENSE FUND,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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July 21, 1995

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The petition and the briefs submitted in opposition to it make three propositions plain. First, there is no dispute about the national significance of this case or its centrality to the future of environmental advertising. Neither opposition brief takes

issue with the extraordinary level of interest voiced by states around the nation about the outcome of this litigation. (Pet. at 14)[1] Neither has quarrelled with the proposition that the determination of this case "is likely to shape the environmental claims all companies make for their products." (*Id.* at n.8)

Second, there is no dispute that the speech at issue in this case is truthful in its nature. According to California, "[b]y enacting § 17508.5, the legislature sought to prevent advertisements for products which, while they may be literally true, do not provide a meaningful environmental benefit." (Cal. Br. at 28) According to the 1993 EPA study attached to California's brief, "environmental advertising claims must be more than simply truthful in the information they relate." (*Id.* at 9Ra)

Petitioners believe that their First Amendment right to articulate "literally true" and "simply truthful" commercial speech may not be so easily overcome and that the criminalizing of such speech by California is well worthy of this Court's review. Neither California nor the intervenors deny the impact of the statute: it prevents the use by manufacturers and distributors of any of the environmental terms defined by California, however truthfully and precisely those terms are used, except as the legislature has determined. It is common ground, then, that California has barred manufacturers and distributors from accurately stating that their offerings are "recycled, 5% post-consumer waste." It is also common ground that critics of petitioners are free to use just such language about their own offerings—and that they do so. (*See* Pet. at 15)

Finally, there is no question that use of the words California has defined has sometimes led to public confusion and that some of the petitioners themselves have sought legislative guidance in the area. While no petitioner has ever sought leg-

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[1] References to prior submissions to this Court are in the following form: Petition for A Writ of Certiorari ("Pet."); opposition brief of California's Attorney General ("Cal. Br."); opposition brief of the intervenors below, the Environmental Defense Fund and Californians Against Waste ("EDF Br.").

islation of the sort California has adopted, there is no issue as to the reality that the defined words have sometimes been used in a misleading fashion.[2]

That is but another way of saying that the ultimate disposition of this case will go far to determining the manner in which states may constitutionally balance the right of advertisers to speak truthfully against the authority of government to regulate or even ban speech that is no more than potentially misleading. *See Peel* v. *Attorney Registration & Disciplinary Commission*, 496 U.S. 91 (1990).[3]

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[2] Even as to this, the magnitude of the problem is hardly as the opposition would have it. The State appends to its brief excerpts of a 1993 EPA study, issued over two years after the adoption of the statute at issue in this case. According to the study, in the entire nation from 1990-1992, a total of 49 proceedings were brought by public and private plaintiffs challenging the use of words in environmental advertising as misleading. Of these, only 25 involved claims using the words defined by California's statute; of those 25, the study reflects that in three cases, the manufacturer substantiated its claim. EPA, *Evaluation of Environmental Marketing Terms in the United States* EPA 741R-92-003 (Feb. 1993) ("1993 EPA Report") at 78-85.

The same EPA study concludes that "[t]he terms most commonly used by marketers, such as *recycled* and *biodegradable*, were also the most widely understood by survey respondents." (Cal. Br. at 10Ra)

[3] Cases cited by the intervenors (EDF Br. at 22 n.13) and the court below (Pet. 20a n.3) for the proposition that lower courts "have uniformly upheld" regulations such as those at issue here "against First Amendment challenges" do not begin to support any such proposition. *Kraft, Inc.* v. *FTC*, 970 F.2d 311 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1254 (1993) involved "an individualized F.T.C. cease and desist order, prohibiting a particular set of deceptive ads" rather than "a prophylactic regulation . . . completely prohibiting an entire category of potentially misleading commercial speech"; the case involved "a completely different animal" than that in this case. *Id.* at 317; *see also id.* at 325. *Bristol-Myers Co.* v. *FTC*, 738 F.2d 554, 557 (2d Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985) similarly involved an individual review of seven specific false and deceptive claims concerning "both the efficacy and the freedom-from-side-effects" of certain of its products. *United States* v. *General Nutrition, Inc.*, 638 F. Supp. 556, 562 (W.D.N.Y. 1986) upheld the prosecution under the Food, Drug and Cosmetic Act of a manufac-

At the same time, the case focuses on a particularly pernicious use of state power over speech: a determination by the State which favors one entire class of speakers—those who presume to speak for "nature"—over those who are routinely the subject of their criticism.

A. The Inconsistency of the California Statute with *Central Hudson*

Two subsections of the seminal articulation by this court of the commercial speech test set forth in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980) are implicated by the case. As regards the requirement of *Central Hudson* that a state may not punish truthful and nonmisleading commercial speech in the absence of "affirmative" proof that the State's interest is "directly advanced" by the statute's restriction, the petition emphasized the irrationality of the statute establishing what this Court has referred to as a "unique and puzzling regulatory framework" that ensures that it will fail to achieve its end. *Rubin* v. *Coors Brewing Co.*, 115 S. Ct. 1585, 1593 (1995). The petition cited, by way of example, the interpretation of the statute below which permitted manufacturers and distributors to tout the environmental benefits of their products so long as their statements were phrased

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turer that misbranded its prescription drug; again, the case did not involve any broad prophylactic rules against the use of any specific language. *American Frozen Food Institute* v. *Mathews*, 413 F. Supp. 548, 555 (D.D.C. 1976), *aff'd per curiam*, 555 F.2d 1059 (D.C. Cir. 1977) upheld regulations applicable to frozen foods that the court concluded did not "proscribe truthful nonmisleading labeling and advertising."

Similarly, the opposition's references (Cal. Br. at 3 & n.2, n.3; EDF Br. at 21 & n.12) to statutes which are supposedly similar to that of California add little to this discussion. Statutes and regulations that define words such as "Annual Percentage Rate" and "Octane Rating" regulate words of measurement—far from those involved here—where standardization is necessary. As to governmental regulations of food labeling (*e.g.*, "low fat", "light") the opposition cites no case at all involving any constitutional challenge asserting a right to accurately provide *more* information than a particular definition includes.

"generally" enough. (Pet. at 18-19) The result, as the petition demonstrated, is wholly irrational: manufacturers like Del Monte may urge consumers to buy their products because of the "general" environmental attractiveness of the tin cans in which they are sold. An advertisement drafted in the singular and not the plural, however, may violate the statute. Just this sort of irrationality, the petition urged, led this Court in *Coors* to hold the statute there unconstitutional.

California has offered no response to this aspect of the statute. The intervenors have responded by claiming that the narrowing by the court below of the statute's applicability "underscores the reasonableness of the law" rather than creating "a constitutional infirmity." (EDF Br. at 11) We do not doubt that the statute would have been unconstitutionally overbroad if it criminalized the "generalized" speech engaged in by Del Monte. But that is hardly a constitutional defense of the statute after its rewriting by the lower courts. Any statute that permits Del Monte and other manufacturers and distributors to tout their products "generally" but not specifically is, by its nature, irrational to the point that it cannot withstand constitutional review. *Coors*, 115 S. Ct. at 1592-93; *see Cincinnati* v. *Discovery Network, Inc.*, 113 S. Ct. 1505 (1993) (striking down city regulation that banned commercial newsracks but allowed noncommercial newsracks where distinction between the two bore no relationship to the city's asserted interest in esthetics).

The same is true with respect to the emphasis in the opinion of the court of appeals on the proposition that other words might freely be used by manufacturers and distributors in place of the ones that the legislature so rigidly defined. The petition demonstrated that the freedom of commercial speakers to state that "this product contains x% [*reused/recaptured*] materials" at the same time they cannot use the word "recycled" negated any potential benefit of the statute. (Pet. at 19-20) The intervenors' opposition brief maintains that the legislature was not seeking "to police every environmental attribute claim" but only some of the ones "most commonly abused." (EDF Br.

at 11) The irrationality of the statute remains the same. If manufacturers and distributors are simply free to substitute the words "reused" or "recaptured" for "recycled", what possible benefit can the State claim it has accomplished? As for the State's defense of the statute, it complains that claims such as "NEW! DEGRADABLE!" "MAXIMUM DEGRADABILITY" and "ENVIRONMENTALLY DEGRADABLE" were "hurled at consumers in advertisements and on product labels throughout the country." (Cal. Br. at 8) Yet, Section 17508.5, which does not define any of the terms quoted above, leaves advertisers absolutely free to continue making such claims. How has the statute addressed the very problem described by the State?[4]

The failure of the State directly to address the arguments made in the petition and the inadequacy of the responses offered by the intervenors to these arguments are just as apparent in their treatment of the last *Central Hudson* factor: has the State affirmatively demonstrated that the statute is "narrowly tailored" and its costs "carefully calculated"? *Board of Trustees* v. *Fox*, 492 U.S. 469, 480 (1989); *Cincinnati*, 113 S. Ct. at 1510 & n.12.

In the course of demonstrating that there were several less restrictive alternatives to the statute, petitioners pointed to the significance of the position of the State below that, properly

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[4] Both the State and the intervenors rely on conclusory (and to a considerable extent, illogical) arguments in the effort to establish that the statute "directly advances" its goals. The State, like the courts below, argues that "the legislature could conclude that there is an immediate connection between advertising and demand for the item advertised, and thus the advertising could be regulated to prevent deception." (Cal. Br. at 22) But any asserted link between advertising and *consumption* establishes nothing about how this statute's definitions of words help prevent *deception*. Similarly, the intervenors argue that i) California has a critical need for waste reduction; ii) recycling programs are vital to the State's efforts to reduce waste sent to landfills; iii) markets for recycled materials collected are not adequately developed; and iv) enhancing these markets is critical to the effort to reduce waste. (EDF Br. at 14) But again, none of this has anything to do with this statute's claimed connection to a better environment.

read, the statute should be understood to have "no application when the words are used in conjunction with modifiers which adequately dispel deception." (*See* Pet. at 23 & n.13) The centrality of this to the State's failure to meet its burden is plain. If the State was content with such a statute to accomplish its goals, it was plain that the legislature that enacted the far broader statute actually adopted had not " 'carefully calculated' the costs and benefits associated with the burden on speech imposed" by the statute. *Cincinnati*, 113 S. Ct. at 1510.

To this argument, as well, the State did not respond at all. Once again, the intervenors' reply is anything but responsive. According to them (but not the State), the State never stated that such a construction was "*compelled* by the First Amendment." (EDF Br. at 17) This is both misleading and irrelevant. The State did argue in the district court that its reading of the statute to allow qualifiers would avoid "raising doubts of the statute's constitutionality." (Docket No. 30 at 34) But beyond any First Amendment concerns, the State's whole theme was that the statute allowed qualifiers because the problem the legislature sought to address with the statute was "unqualified claims", terms used "alone" "unadorned" "without definition" "unexplained" or "standing on their own". (*Id.* at 13, 16, 22, 27, 31) Thus the State's position was that the statute simply did not cover, was not meant to cover, and should not be read as covering, situations in which "manufacturers and distributors choose to adequately explain in their advertisements and on their labels what they mean by the use of environmental terms." (*See* Pet. at 23 n.13)

The less speech-destructive alternatives relied upon in the petition, such as the FTC guidelines which themselves permit qualifying language in order to explain the context in which environmental terms are used, also remain untouched by the opposition briefs. The intervenors' reference, in their final footnote (EDF Br. at 22 n.14), to the fact that California is itself considering replacing § 17508.5 with regulations incorporating the FTC guidelines demonstrates with clarity that the

California legislature is well aware of this far less speech-restrictive legislative response in this area.

The petition referred, as well, to two other less speech-intrusive mechanisms. (Pet. at 24-25) One is the adoption of legislation directed not at speech but at whatever environmental flaws were thought to exist in petitioners' packaging, foods or the like. *See Coors* 115 S. Ct. at 1593-94 (availability of other options including direct regulation indicated that statute was more extensive than necessary, in violation of *Central Hudson*). Yet another alternative is the continuation of some sort of case-by-case approach such as California has already used. Again, the State offers no response except to quote the court below. And if the EPA study now proffered by the State is relevant at all, it is because it shows the effectiveness of a case-by-case approach; the study indicates that some challenged environmental claims have been voluntarily withdrawn, others have been substantiated, and still others resulted in no action by the complaining entity. 1993 EPA Report at 78-85. Certainly the study does not begin to justify the broad prophylactic prohibitions California has adopted.

Petitioners do not doubt that the "fit" the State must demonstrate need not be "necessarily perfect" or "the single best disposition." *Florida Bar* v. *Went For It, Inc.*, 63 U.S.L.W. 4644, 4648 (U.S. June 21, 1995). The existence of all these alternatives, however, amply demonstrates the inability of California "affirmatively" to demonstrate that its statute is "narrowly tailored" since a statute which disregards far less restrictive and more precise means of achieving its goals, by its nature, is not narrowly tailored. *Id.*; *Coors*, 115 S. Ct. at 1593-94; *Cincinnati*, 113 S. Ct. at 1510 & n.13.

B. The Inconsistency of the California Statute with *R.A.V.* v. *City of St. Paul*

Both the State and the intervenors maintain that Judge Noonan was incorrect in concluding that Section 17508.5 unconstitutionally distinguishes between the speech of petitioners

and their critics. Manufacturers and distributors, they maintain, are as free as the intervenors to engage in purely political debate; the intervenors are as limited by the statute as are manufacturers and distributors in their purely commercial discourse. There is thus no viewpoint distinction at all.

It is an argument Anatole France might have savored.[5] It is, after all, now undisputed that California critics of manufacturers or distributors are free to tout *their* environmental purity by asserting that their reports are published on "recycled paper, 5% of which is postconsumer waste" at the same time California manufacturers and distributors commit a crime when they accurately use the identical language about their offerings. (*See* Pet. at 15, 26) How, then, can it be seriously argued that the statute does not discriminate against one type of speaker in favor of another?

Similarly, there is no dispute that manufacturers and distributors are barred from urging upon prospective consumers that their products are "biodegradable within two years", however truthful that statement may be. But the intervenors are free, as part of their political agenda, to use the word "biodegradable" as they wish—including using it to denounce those who make environmental claims with which they disagree—*e.g.*, "products that are biodegradable within two years offer no real benefit to the environment."

In this context, it is no answer to Judge Noonan's conclusion of viewpoint discrimination to assert that manufacturers and distributors may freely participate in purely political debate about environmental issues. The arena in which they *choose* to speak about environmental issues most is the commercial marketplace. To conclude that when they do so, they are subject to the strictures of California law at the same time their critics are not surely puts form before substance in a manner facially

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[5] "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread." A. France, *The Red Lily* (1894).

inconsistent with this Court's determination in *R.A.V.* v. *City of St. Paul*, 112 S. Ct. 2538 (1992).[6]

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
July 21, 1995

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[6] Judge Noonan's observations about the "powerful, evocative, almost sacred" use of the defined terms by the intervenors (Pet. at 31a-32a) is echoed by the intervenors' assertion in their brief that the "cost" of "exempting advertisements with qualifying language" is that the "informational significance of the term of art, standing alone, necessarily diminishes." (EDF Br. at p. 18 n.11) What the intervenors are really saying is that if petitioners were allowed to qualify the defined terms—*e.g.* "recycled, 5% postconsumer waste"—the defined words would no longer be sacred "shorthand". (*Id.* at 9)